Covid-19

What, When, & Where?

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COVERAGE OF COVID-19 UNDER THE KANSAS WORKERS COMPENSATION ACT

Would Infection From COVID-19 Be Considered An Accident, A Series Of Repetitive Traumas, Or An Occupational Disease?

K.S.A. 44-508(d) states:

"Accident" means an un-designed, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

An infection from COVID„19 would not meet the definition of "accident" since the infection cannot be identified by the time of occurrence - nor can the claimant prove that the infection occurred in a single work shift. Finally, the symptoms would not occur during a single work shift since there appears to be a delay between infection and onset of symptoms.

K.S.A. 44-508(e) indicates:

"Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury'. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

An infection from COVID-19 would be difficult to characterize as a "repetitive use" injury. It may be a "cumulative trauma" if the infection is associated with the amount of time someone is exposed - i.e. - the viral load. In other words - if the individual is exposed to infection by COVID-19 numerous times, does this increase not only the chance of getting the disease - but also increase the severity of the disease?

"Viral load" refers to how much virus is present in a sample taken from the patient. It would seem logical that - if a person is exposed to the virus repeatedly - or for a longer period of time - the viral load would be greater. There appears to be an association between severity of symptoms and the viral load in studies of influenza. However, it does not appear to be this simple of a proposition in COVID-19.

This lack of scientific certainty between exposure, viral load, and severity of the medical condition makes it problematic to argue that the COVID-19 infection is a result of a series of micro-traumas.

The Court of Appeals has ruled in the past that an occupational disease may also be an injury by repetitive trauma. In Casey v. Dillon Companies, Inc., 34 Kan. App.2d 66, 74-75, 224 P.3d 182, rev. denied 280 Kan. 981 (2005), the Court found that whether a repetitive injury is due to an accident or occupational disease is a matter of semantics. See also Berry v. Boeing Military Airplanes, 20 Kan. App. 220, 227, 885 P.2d 1261 (1984) (whether an injury is due to repetitive accidents or an occupational disease is nothing more than an interesting issue of semantics).

These cases were decided before the 201 1 changes to the Kansas Workers Compensation Act and the exclusionary language of K.S.A. 44-508 which indicates that a repetitive trauma cannot be an occupational disease.

It would appear that infection from COVID-19 most easily fits into the occupational disease statutes.

Analyzing Infection From COVID-19 As An Occupational Disease

Occupational diseases are treated the same as an injury under the Act. K.S.A. 44-5a01(a). An occupational disease:

"shall mean only a disease arising out of and in the course of the employment resulting from the nature of the employment in which the employee was engaged under such employer, and which was actually contracted while so engaged. "Nature of the employment" shall mean, for purposes of this section, that to the occupation, trade or employment in which the employee was engaged, there is attached a particular and peculiar hazard of such disease which distinguishes the employment from other occupations and employments, and which creates a hazard of such disease which is in excess of the hazard of such disease in general. The disease must appear to have had its origin in a special risk of such disease connected with the particular type of employment and to have resulted from that source as a reasonable consequence of the risk. Ordinary diseases of life and conditions to which the general public is or may be exposed to outside of the particular employment, and hazards of diseases and conditions attending employment in general, shall not be compensable as occupational diseases, except that compensation shall not be payable for pulmonary emphysema or other types of emphysema unless it is proved, by clear and convincing medical evidence to a reasonable probability, that such emphysema was caused, solely and independently of all other causes, by the employment with the employer against whom the claim is made, except that, if it is proved to a reasonable medical probability that an existing emphysema was aggravated and contributed to by the employment with the employer against whom the claim is made, compensation shall be payable for the resulting condition of the workman, but only to the extent such condition was so contributed to and aggravated by the employment."

The statute excludes ordinary diseases of life and condition to which the general public is or may be exposed. The Act does not define this term but the appellate review has seen one case that analyzed the term of art. Ordinary diseases of life are "commonly encountered diseases, such as the flu, to which the general public is equally at risk of suffering without regard for the person's employment." *Strome v.N.R. Hamm Quarry*, Docket No. 162,253, at 4 (WCAB Jan. 1996) (remanded).

The hazard of the disease must come from the employee's occupation. Strome v. N.R. Hamm Quarry, No. 78,886, 1998 Kan. App. Unpub. LEXIS 1200, *6 (Kan. App. 1998) (unpublished). "Ordinary diseases of life" are not compensable because these diseases develop without exposure to a hazard particular to the workplace. Id. "For example, the Board noted that the flu would be an ordinary disease of life… Because the risk of contracting the flu is ubiquitous, the flu is not an occupational disease." Id. at *6-7.

What could be more ubiquitous than a disease that caused a global pandemic? It is contagious enough that we have numerous guidelines to follow from the CDC and the Kansas Department of Health and Environment that require social distancing of six feet from anyone not in your household. COVID-19 is and frequently compared to flu in terms of both transmission and symptoms. Strome and the Board's example is the only analysis attempting to define "ordinary diseases of life."

COVID-19 is most likely a disease of ordinary life but there could be room for argument with certain types of employment and certain fact scenarios.

Elements Required to Prove Occupational Disease

If COVID-19 is not considered an ordinary disease of life for a particular case, the claimant still must prove that it more likely than not came from the conditions of employment. This requires proving three elements:

1) The occupational disease must arise out of and in the course of employment;
2) The occupational disease must result from the nature of the employment in which the employee was engaged; and
3) The occupational disease must have actually been contracted while the employee was engaged in his or her employment.

Ordinary Disease Of Life v. Occupational Diseases

The term "ordinary diseases of life" has been construed "to refer to commonly encountered diseases" - such as the flu - to which the general public is equally at risk of suffering without regard to their employment. Strome v. N. R. Quarry, Docket Number 162,253 (WCAB 1996).

The "ordinary diseases of life" defense appears to be the most often cited reason for denial of a COVID-19 claim in media reports or commentary on the subject.

The way in which Kansas defines this defense may help claimants pass this roadblock to compensability. In Boyer v. Tony's Pizza Service, WI-481268 (WCAB), the respondent argued that hyper-reactive airway disease was an ordinary disease of life. The Board disagreed, stating:

"Although the term 'ordinary diseases of life' is not defined by the Workers Compensation Act, the Appeals Board finds the Legislature intended to exclude as occupational diseases such illnesses and maladies that have no special risk or relationship to the employment or job being performed. Due to the individual nature of each occupation, the question whether an illness falls under the definition of an occupational disease or ordinary disease of life, must be decided on a case-by-case basis. The question is not whether the illness is commonly diagnosed, but whether the employment presents a peculiar or special risk to acquire that disease."

Therefore, community spread of COVID-19 does not appear to be an absolute defense to a Kansas workers compensation claim.

Moreover, COVID-19 may be an occupational disease in some circumstances but an ordinary disease of life in other factual situations. In Moore v. Cimarex Energy Company, 326 P.3d 1090 (2014), the claimant argued that he suffered from occupationally-induced asthma. The Court of Appeals found that it was undisputed that Moore suffered from an intermittently serious case of asthma. The resolution of Moore's case turned on whether his asthma is an "occupational disease" or an "ordinary disease of life".

Asthma can be either an occupational disease or an ordinary disease of life. This is a factual dispute based on the medical evidence presented. The Board found that Moore failed to prove a causal link between chemicals to which he was exposed at work and his asthma. The Court of Appeals affirmed this factual finding.

Another example of this issue is found in Hibbs v. Mies & Son Trucking, LLC, 2020 WL 299181 1 (KWCAB). The claimant drove a truck for the respondent. This required him to drive in New Mexico where he encountered a dust storm.

He later developed a cough which was diagnosed as a fungal infection in the lungs coccidioidomycosis. Respondent argued that this was an ordinary disease of life referring to commonly-encountered diseases to which the public in the southwestern United States is equally at risk of suffering without regard to a person's employment.

Dr. Thomas - one of the treating physicians - found the condition to be related to the claimant's occupation of being a truck driver. The Board found that coccidioidomycosis is not endemic in Kansas. It is not a disease of ordinary life in that the claimant's risk for this condition was greater because of his work for the respondent.

The spores are located in the soil of New Mexico. The work exposed the claimant to a dust storm in New Mexico. Thus, the condition is an occupational disease. The claimant's work posed a particular and peculiar hazard - or special risk - of contracting such a disease.

Another example of this defense is found in Rojas v. Adias / Nursefinders of Wichita, 1995WL59824 (KWCB). The Board found that shingles was not an ordinary disease of life even though shingles comes from a virus that is the same virus that causes chickenpox. The Board ruled that the nature of Rojas' employment exposed her to the danger of infection from shingles.

See also *Beard v. Wolf Creek Nuclear Operating Corporation*, 2019 WL 425361 (KWCAB).

Therefore, COVID-19 - like shingles, chickenpox, or hyper-reactive airway disease - would not be considered an ordinary disease of life simply based on the number of cases in the United States. It would be an occupational disease if the employment "presents a peculiar or special risk to acquire that disease".

OSHA has divided occupations into four (4) risk exposure levels:

1 . Very High Exposure Risk: Jobs with high potential for exposure to be known or suspected sources of COVID-19 during specific medical, postmortem, or laboratory procedures. These workers include healthcare and morgue workers performing aerosol-generating procedures on - or collecting / handling specimens from potentially infectious patients or bodies of people known to have - or suspected of having - COVID-19 at the time of death;

2. High Exposure Risk: Jobs with high potential for exposure to known or suspected sources of COVID-19. Workers in this category include healthcare delivery, healthcare support, medical transport, and mortuary workers exposed to known or suspected - COVID-19 patients;

3. Medium Exposure Risk: Jobs that require frequent / close contact with people who may be infected but who are not known or suspected patients. Workers in this category include those who may have contact with the general public e.g. schools, high population-density work environments, some high volume retail settings - including individuals returning from locations with widespread COVID-19 transmission; and

4. Lower Exposure Risk: Jobs that do not require contact with people known to be or suspected of being infected. Workers in this category have minimal occupational contact with the public or other coworkers.

See OSHA.gov/COVID-19

Kansas keeps substantial records showing clusters of COVID-19 cases. For example these reports would show the number of infections with people who work at meat-packing plants, nursing homes, hospitals, or at prisons. This type of information should be helpful in fulfilling the requirements to show that COVID-19 meets the definition of an occupational disease.

Detailed evidence describing the exposure of the worker to the disease-causing agent has often been found to satisfy the "particular and peculiar hazard" and "special risk" elements of a compensable occupational disease. Box v. Cessna Aircraft Company, 236 Kan. 237, 689 P.2d 871 (1984).

The "Arising Out Of And In The Course Of Employment" Requirement

The two (2) phrases "arising out of" and "in the course of" have separate and distinct meanings. They are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place, and circumstances under which an accident occurred and means that an injury happened while the employee was at work and in the employer's service. Atkins v. Webcon, 308 Kan 92, 419 P.3d (2018).

The phrase "arising out of" points to the causal origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidence of employment. Scott v. Hughes, 294 Kan. 403, 416, 275 P.3d 236 (2012).

Causation is determined on a case-by-case basis although it is impossible to establish a bright-line test to determine whether an injury arises out of employment, 'the focus of inquiry should be on whether the activity that results in injury is connected to, or is inherent in, the performance of the job.'

Bryant v. Midwest Staff Solutions, Inc., 292 Kan. 585, 596, 257 P.3d 255 (201 1).

No COVID-19 cases have been litigated to completion. However, the "arising out of" requirement has been considered in cases involving injury through infection. For example there have been prior cases involving Hepatitis C infections, shingles infection, and MRSA infections.

In Stutzman v. City of Lenexa, 33 Kan. App.2d 160 (Kan, App. 2004), the claimant alleged that he contracted a Hepatitis C infection (HCV) while in the course of his employment as a police officer. Conflicting medical opinions - based on the onset of symptoms and objective medical evidence of damage to organ functions from the HCV - were given concerning when this police officer contracted HCV.

There are several similar Board of Appeal cases. In each case, the overwhelming issue concerns whether the claimant can prove that the injurious exposure occurred at work. See Haman-Pitts v. Emporia State University, Docket Number 241 , 722 (WCAB September, 1999) & Greene v. Cheney Golden Age Home, Inc., Docket Number 1 ,013,384 (WCAB November, 2004) (case involving meningitis).

There are also several cases involving Methicillin-Resistant Staphylococcus Aureus (MRSA). In Garcia v. Buckley Industries, Inc., Docket Number (WCAB March, 2012), the claimant alleged that she contracted MRSA as a result of exposure at work. The cause of the injury or illness was alleged as working with fiberglass in an unsanitary environment The disease was contracted - according to the claimant - because of the numerous tiny cuts she got while doing her job. The Board denied her claim in that she could not point to a specific time or place where the infection occurred.

The common thread in all of these cited cases is the necessity to establish that the disease in question was either directly caused by the employment or the employment subjected the employee to a hazard greater than that which the employee would have been subjected to in non-employment life.

Contact tracing may provide the proof to satisfy the "arising out of" requirement. Contact tracing is the process of identification of persons who may have come in contact with an infected person and subsequent collection of further information about these contacts. By tracing the contacts of infected individuals, testing them for infection, isolating or treating the infected, and tracing their contacts in turn, public health aims to reduce infections in the population.

Contact tracing has been used in public health for decades. For example - smallpox was eradicated - not by universal immunization - but by exhaustive contact tracing. Scutchfield, F. Douglas, Principles of Public Health Practice.

Another path to proving compensability may involve proving not that the injurious exposure occurred at work but - rather - that an unrelated work accident made the claimant more susceptible to COVID-19. This is seen in workers compensation claims involving MRSA. See Johnson v. Labor Ready, Docket Number 1 ,038,509 (WCAB February, 2009) (workrelated fall created muscle tissue damage leaving him vulnerable to the "seeding" that can happen with CA-MRSA).

For example - if an injured worker contracted COVID-19 through community spread but the effects of the disease were more severe due to the work accident, the claim may be compensable. One example of this might involve a worker with occupational-induced asthma.

As science learns more about the infectious process - and why some individuals appear to be more susceptible to the injurious effects of this disease - proving that illness from COVID-19 is work-related may become less difficult,

Occupational Diseases And The Prevailing Factor Requirement

K.S.A. 44-508 defines "injury" as a change in the physical structure of the body. An injury may occur through accident, repetitive trauma, or through an occupational disease. K.S.A. 44-508(f)(1) indicates that

"Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined".

K.S.A. indicates:

"An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

K.S.A. 44-508(f) does not specifically apply the prevailing factor standard of causation to an occupational disease. The occupational disease statutes do not mention the prevailing factor standard of causation. Nevertheless, the Board has applied this heightened causation standard to occupational diseases. See Hibbs v. Mies & Son Trucking, LLC, 2020 WL 299181 1 (WCAB) & Beard v. wolf Creek Nuclear Operating Corporation, 2019 WL 425361 (KWCAB).

COVID-19, Workers Compensation, And Exclusivity

K.S.A. 44-501 (a) states:

"If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act

The statute also provides:

"(b) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.'

Under this subsection, a worker who recovers benefits for an on-the-job injury from an employer under the Act cannot maintain a civil action for damages against the employer or against a fellow employee. The remedy under the Act is exclusive. Scott v. Hughes, 281 Kan. 642, 645 (2006).

However, if injury through infection by COVID-19 is not compensable due to the ordinary diseases of life defense, exclusivity protections against the employer would not apply. In fact, occupational diseases were not originally covered under the Act. As such, exclusivity did not apply. See Echord v. Rush, 124 Kan. 521 (1927).

Judge Franklin Theis (District Court of Shawnee County, Kansas) discussed the exclusivity defense in Davis v. The Goodyear Tire & Rubber Company, Case Number 2013CV770. This case involved a heart attack which occurred at work. The plaintiff alleged that Goodyear provided an unsafe work environment which led to the heart attack.

Goodyear filed a Motion for Summary Judgment based on the protections of exclusivity. Judge Theis denied the Motion stating:

"Seemingly, if the Kansas Workers Compensation Act does not compensate the injury claim made - not merely rendering it penurious in degree or more difficult to obtain, but rather, however, leaving an absence of coverage for the particular injury altogether - then the Act should not bar its presentation in a courtroom forum as a common law tort claim, there being then a total absence of any statutory quid pro quo at all to support any forfeit under sec. 18, other than the mere fact that there exists a workers compensation act and the injury occurred while Mr. Davis was at work.'

The Missouri Supreme Court considered the 2005 changes to the Missouri Workers Compensation Act - including changes in the definition of "accident" and "injury". The Supreme Court found these changes did not violate the Missouri constitution. In doing so, the Court commented on the impact of the changes on exclusivity.

"The definitions for 'accident' and 'injury' are utilized in the exclusivity clause and amendment of those definitions impacts the scope of the workers' compensation laws. By limiting those definitions, the scope of the act is limited. Any removal of certain injuries and accidents from the scope of the act also places the workers who have suffered those injuries outside the workers' compensation system, and they are no longer governed by the act. ... This section (287.120) makes the act the exclusive remedy for the employee only on account of 'such accidental injury or death'. In other words, it is the exclusive remedy only for those 'injuries' that come within the definition of the term 'accident' under the act. As section 287.120.2 itself states other such rights and remedies that are not provided for in the act are not subject to these exclusivity provisions - that is, they still can be sued for at common law."

MARA v. Department of Labor, 277 SW 3d 670, 679 (2009).

If injury through infection from COVID-19 is excluded from coverage under the Kansas Workers Compensation Act due to the ordinary diseases of life defense, exclusivity would not apply. Thus, injured workers could sue in civil court for the failure to provide a safe workplace.

The Impact of House Bill 2016

The bill creates the COVID-19 Response and Reopening for Business Liability Protection Act. One section of this bill indicates that a person conducting business in Kansas shall be immune from liability in a civil action for a COVID-19 claim if such person was acting pursuant to - and in substantial compliance with - public health directives applicable to the activity giving rise to the cause of action when the cause of action accrued. This section expires on January 26, 2021 and the bill states that this provision applies retroactively to any cause of action occurring on or after March 12, 2020.

The bill does state that no provision affects workers compensation law - including the exclusive application of the law.

In addition, the occupational disease statutes allow for defense of willful failure to use a guard or protection against disablement required pursuant to any statute and provided for him, or a reasonable and proper guard and protection furnished by the employer. K.S.A. 44-5a05. The employer could raise this defense for failing to wear a mask or failing to maintain a distance. You also run a serious risk of violating an internal safety provision if anyone traveled when they were banned from doing so under the employer's policy. Many employers have enacted such policies.

If the COVID-19 infection is not an occupational disease, this law may set up a "dual denial" situation and obvious constitutional problems involving denial of due process.

Judge Thies - in the Davis case - stated that the Kansas Legislature may exclude certain injuries, certain employers, or certain classifications of employees from its coverage.

"However, because of Section 18 of the Kansas Bill of Rights, the Kansas legislature may not make such exclusions of coverage and then simultaneously claim the benefit to employers of immunity from suit for any negligence provoking that harm to the excluded employees."

See Smith v. Western States Portland Cement Company, 94 Kan. 501 (1915).

The Defense Production Act

Professor Michael Duff - a nationwide expert on workers compensation law - recently discussed the "pervasive urban myth that the Defense Production Act has absolutely immunized meatpacking facilities from tort liability". He can find no reported cases in which the Act has ever immunized a Defense Production Act contractor from tort liability.

The Courts have not definitively resolved whether Section 4557 or 4558 immunize DPO contractors from tort liability for harms proximately flowing from performance of DPO contracts. The Federal government has previously argued that the DPA provides immunity only from breach of contract suits. See Hercules Inc. v. U.S., 516 U.S. 417 (1996).